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Counterdefendant Moog Inc.

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MOOG INC.,

Plaintiff,

v.

SKYRYSE, INC., ROBERT ALIN
PILKINGTON, MISOOK KIM,
and DOES NOS. 1-50,

Defendants.

Case No. 2:22-cv-09094-GW-MAR

Hon. George H. Wu

**PLAINTIFF AND
COUNTERDEFENDANT MOOG
INC.'S NOTICE OF MOTION AND
MOTION FOR LEAVE TO AMEND
TO FILE AMENDED COMPLAINT**

Date: June 19, 2023

Time: 8:30 a.m.

Ctrm.: 9-D

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*[Filed concurrently with Declaration of
Kazim A. Naqvi and [Proposed] Order]*

Complaint Filed: March 7, 2022
Counterclaims Filed: January 30, 2023

1 TO THE ABOVE CAPTIONED COURT, AND TO ALL PARTIES AND
2 THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that at 8:30 a.m. on Monday, June 19, 2023, or as
4 soon thereafter as this matter may be heard in Courtroom 9D of the above-
5 captioned Court, located at the United States Courthouse, 350 West 1st Street, Los
6 Angeles, CA, 90012, the Honorable George H. Wu presiding, Plaintiff and
7 Counterdefendant Moog Inc. (“Moog”) will, and hereby does, move for an order
8 pursuant to Rule 15 granting it leave to file an Amended Complaint.

9 This motion is made on the grounds that Moog’s proposed amendments
10 merely seek to conform its pleading to the facts and evidence adduced in the case.
11 There is no prejudice to Defendants. Through its proposed amendment, Moog
12 seeks to drop two causes of action, add two causes of action, and modify two
13 existing causes of action. All of Moog’s proposed amendments relate to the same
14 nucleus of facts that the Defendants have been aware of and the parties have
15 litigated throughout this case. With almost one year remaining before the fact
16 discovery cut-off, Defendants have ample time to conduct any additional discovery
17 needed related to the additional claims or allegations. There is also no bad faith, or
18 undue delay, and the proposed amendments are not futile. This is also Moog’s first
19 proposed amendment. A copy of the proposed Amended Complaint is attached as
20 Exhibit 1 to the concurrently-filed Declaration of Kazim A. Naqvi. A copy of a
21 redline showing the changes made compared to the original Complaint is attached
22 as Exhibit 2 to the Naqvi Declaration.

23 This motion is made following the conference of counsel pursuant to C.D.
24 Cal. Local Rule 7-3 that took place on May 15, 2023 at 2:00 p.m. Further, and
25 without any obligation to do so, on May 19, 2023, Moog’s counsel circulated a
26 draft of the Proposed Amended Complaint, and a redline of the Proposed Amended
27 Complaint compared to the Original Complaint, to counsel for all Defendants.
28

1 This motion is based on this Notice, the accompanying Memorandum of
2 Points and Authorities, the Declaration of Kazim A. Naqvi, all pleadings, papers
3 and other documentary materials in the Court's file for this action, those matters of
4 which this Court may or must take judicial notice, and such other matters as this
5 Court may consider in connection with the hearing on this matter.

6
7 Dated: May 22, 2023

SHEPPARD MULLIN RICHTER & HAMPTON LLP

8 By /s/ Rena Andoh
9 Rena Andoh

10 Attorney for Plaintiff and Counterdefendant
11 MOOG INC.
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1 **I. INTRODUCTION**

2 When Moog filed its initial Complaint on March 7, 2022, and with its
3 investigation ongoing, it was only aware that defendant Misook Kim had stolen
4 and misappropriated over 136,000 Moog files on her way out the door and upon
5 starting employment at Skyrise. Since the initial filing, Moog has unfortunately
6 learned that the scope of theft and misappropriation is much bigger, such that the
7 volume of stolen data *exceeds 1.4 million files related to at least 20 Moog flight*
8 *control programs (including several sensitive government programs)*. These
9 additional acts of theft and misappropriation were committed by defendant Robert
10 Alin Pilkington (collectively with Kim, the “Individual Defendants”), and several
11 other Skyrise personnel. Moog has also discovered that Skyrise personnel
12 possessed, used, and disclosed Moog’s trade secrets and other non-public
13 information to a massive extent. With the fact discovery cut-off nearly one year
14 away, Moog seeks to amend its Complaint for the first time at this early stage in
15 the case to conform to the facts and evidence adduced in the case.

16 Analysis of all five of the *Foman* factors shows that Moog’s proposed
17 amendment is proper in light of the strong, liberal policy favoring amendment.
18 There is no prejudice to Defendants. Through its proposed amendment, Moog
19 seeks to drop two causes of action, add two causes of action, and modify two
20 existing causes of action. All of Moog’s proposed amendments relate to the same
21 nucleus of facts that the Defendants have been aware of and litigated since the
22 inception of this case. The proposed amendments do not change the scope of
23 discovery or the trajectory of this case. And, with almost one year remaining
24 before the fact discovery cut-off, Defendants have ample time to conduct any
25 additional discovery needed related to the additional claims or allegations.

26 There is also no bad faith or undue delay. Moog is not seeking to delay
27 proceedings or skirt the Court’s jurisdiction. Moog is seeking amendment at an
28 early and reasonable time, especially since much of the evidence underlying the

1 proposed amendments was not made available to Moog until just a few months
2 ago. Moog has also sought amendment for the first time and in conjunction with
3 the Court's recent order granting the Individual Defendants' Rule 12(b)(6) motion
4 to dismiss, by which it granted Moog leave to amend two causes of action. Rather
5 than amending solely in response to the Court's order and then seeking broader
6 amendment again later, Moog is seeking to amend its pleading once in omnibus
7 fashion as agreed to by stipulation of the Parties. Moog's proposed amendment
8 furthers judicial economy.

9 Finally, the proposed amendments are not futile. The added claims relate to
10 pre-existing claims which were not challenged at the pleading stage. The additional
11 allegations make clear they are plausible and support a basis for relief. This is
12 Moog's first proposed amendment, and given the facts and circumstances of this
13 case, the Court should grant Moog's Motion and enter the Proposed Amended
14 Complaint attached as Exhibit 1 to the concurrently-filed Declaration of Kazim A.
15 Naqvi.

16 **II. FACTUAL AND PROCEDURAL BACKGROUND**

17 **A. The Complaint**

18 On March 7, 2022, Moog filed its Complaint, alleging that Defendants had
19 engaged in the theft of Moog's most sensitive and proprietary data. (Dkt. 1). Moog
20 concurrently filed a Motion for Temporary Restraining Order/Preliminary
21 Injunction (the "PI Motion"). (Dkt. 4.) At the time the Complaint was filed, Moog
22 had discovered that prior to leaving Moog to join Skyryse, Kim had stolen over
23 136,000 files of Moog's most sensitive and proprietary data relating to its flight
24 control software (including over 43,000 source code files) that took over 15 years
25 to develop. (Dkt. 1, ¶ 1).

26 **B. The TRO and Expedited Discovery Order**

27 On March 11, 2022, all Defendants stipulated to a temporary restraining
28 order (the "TRO"), and it was entered by then-presiding Article III District Judge

1 Lawrence J. Vilardo as a Court order. (Dkts. 25, 28.) It provides, in relevant part:

- 2 • By April 1, 2022, each Defendant must deliver to Moog all Moog non-
3 public information in each Defendant's possession, custody or control or,
4 if such information has been integrated or used by any Defendant in such
5 a manner that such delivery "necessarily includes property of any
6 Defendant," then "such information shall be given to a third-party
7 forensics firm [iDiscovery Solutions ("iDS")] . . . for forensic imaging in
8 lieu of providing such information directly to Plaintiff" (*id.*, § 2);
- 9 • Individual Defendants shall produce to iDS all "electronic devices used
10 in the last twelve months." (*id.*, § 4); and
- 11 • "Any of Plaintiff's non-public information, documents, records, files, or
12 data in any Defendant's possession, custody, or control (if any) shall not
13 be used or reviewed by Defendants" (*id.*, § 7).

14 The TRO also contemplated a May 9, 2022 hearing date on Moog's PI Motion (*id.*,
15 § 10).

16 On March 17, 2022, the Parties stipulated to certain expedited discovery
17 procedures for written discovery and depositions. (Dkts. 33, 36.) Therein, the
18 Parties stipulated to a July 6, 2022 hearing date on Moog's PI Motion. (*Id.*, § 6.)

19 On April 1, 2022, Kim and Pilkington produced 23 electronic devices to
20 iDS, and Skyryse turned over Kim's Skyryse-issued laptop device, along with a
21 hard drive containing 11,093 files pulled from Pilkington's Skyryse-issued laptop.
22 (Dkt. 142-2.)

23 **C. Skyryse's Admission of Possession of Moog Non-Public**
24 **Information and Spoliation of Evidence**

25 In an April 26, 2022 Conference with the Court, Skyryse's counsel disclosed
26 the following regarding Skyryse's possession of Moog non-public information:

- 27 • "We have discovered that there is . . . likely, [Moog] non-public information
28 at Skyryse" (4/26/22 Transcript (Dkt. 95), 17:24-18:3);

- 1 • “we have found enough [Moog non-public information] that it does – it
- 2 causes us concern” (*Id.*, 18:12-13);
- 3 • Skyryse found a “significant number of hits” from the “list of file names and
- 4 hash values” provided by Moog. (*Id.*, 19:17-24);

5 Regarding deletion of data, Skyryse’s counsel disclosed the following:

- 6 • “since the complaint was filed certain information has been deleted.” (*Id.* at
- 7 18:17-18);
- 8 • “an alarming series of deletions” (*Id.* at 19:4-5);
- 9 • “some of the information deleted may not be recoverable” (*Id.* at 19:5-6.)

10 Skyryse’s counsel further disclosed that Kim and Pilkington had been terminated

11 from Skyryse, and that 15 Skyryse employees had been placed on administrative

12 leave. (*Id.* at 15:4, 20:5-12, 21:1-2.)

13 **D. Defendants’ Violations of the TRO**

14 Skyryse stipulated to a Court order to turn over all Moog non-public

15 information on or before April 1, 2022. Unfortunately, throughout the pendency of

16 this case, Skyryse has continued to produce Moog non-public information only

17 upon demand by Moog, and often only after protracted motion practice. Moog was

18 also forced to subpoena multiple third parties, who produced a substantial volume

19 of Moog non-public information within the last few months. This caused the

20 scheduled hearing date on Moog’s PI Motion to be delayed multiple times, and

21 ultimately vacated.

22 The productions made after April 1, 2022 which are relevant to Moog’s

23 trade secret misappropriation and other claims include:

- 24 • On April 29, 2022, Skyryse turned over to iDS Pilkington’s two Skyryse-
- 25 issued laptops and a thumb drive containing 568 additional files. (Dkt.
- 26 142-6). Skyryse also made a document production directly to Moog of
- 27 data that “ostensibly or potentially contains Moog non-public
- 28 information,” including 10 Moog source code files. (*Id.*)

- 1 • On May 5, 2022, Skyryse turned over additional files from “Skyryse’s
2 Gitlab source code repository” which were identical hits on the search
3 terms provided by Moog on April 12, 2022. (Dkt. 142-7.)
- 4 • On December 2, 2022, Skyryse produced to iDS images of three
5 Skyryse-issued laptops belonging to employees Sathya Achar, Eric
6 Chung, and Tri Dao, all of which were laden with Moog data. (Dkt. 400-
7 3, ¶¶ 8-21.)
- 8 • On November 17, 2022, Skyryse third party Lori Bird produced 90
9 documents in response to Moog’s subpoena, which confirmed that Bird
10 frequently possessed, received, accessed, transmitted, and used Moog
11 non-public information (including proprietary source code documents
12 and software development checklists and templates) during her tenure at
13 Skyryse, including using her Skyryse e-mail account and Skyryse laptop.
14 (Dkt. 400-3, ¶¶ 40-42; Dkt. 400-5, ¶¶ 39-46.)
- 15 • On January 17, 2023, third party Hummingbird Aero produced 120
16 documents in response to Moog’s subpoena, which is littered with
17 evidence of Skyryse employees (using Skyryse e-mail accounts and
18 devices) possessing, disclosing to third parties, accessing, and using
19 Moog non-public information. (Dkt. 400-3, ¶¶ 22-33; Dkt. 400-5, ¶¶ 19-
20 38.)
- 21 • On February 6, 2023, third party Rex Hyde produced 198 documents in
22 response to Moog’s subpoena, which is littered with numerous examples
23 of Skyryse employees (using Skyryse e-mail accounts and devices)
24 possessing, disclosing to third parties, accessing, and using Moog non-
25 public information. (Dkt. 400-3, ¶¶ 22-33; Dkt. 400-5, ¶¶ 19-38.)
- 26 • On February 17, 2023, Skyryse produced 2,920 documents from Lori
27 Bird. All but two of these e-mails were from Bird’s Skyryse e-mail
28 account and the production contains substantial evidence of Skyryse

1 employees (using Skyryse e-mail accounts and devices) possessing,
2 disclosing to third parties, accessing, and using Moog non-public
3 information. (Dkt. 400-3, ¶¶ 44-45; Dkt. 400-5, ¶¶ 47-87.)

4 The severely untimely nature of Skyryse's productions are addressed in further
5 detail in Moog's pending Motion to Enforce Compliance with the March 11, 2022
6 TRO and for Sanctions (Dkt. 400) (the "Motion to Enforce"), scheduled for
7 hearing on June 8, 2023.

8 **E. Moog Has Been Forced to File Several Motions to Obtain**
9 **Discovery and Compliance with the TRO**

10 Because of Defendants' obstruction, failure to comply with discovery
11 obligations, and failure to comply with the TRO, Moog has been forced to file at
12 least the following motions:

- 13 • 5/10/22 – Motion for Entry of Proposed Inspection Protocol (Dkt. 96);
 - 14 • 5/23/22 – Motion for Scheduling Orders (non-compliance of the March
15 11 Order) (Dkt. 118);
 - 16 • 6/8/22 – Motion to Compel Disclosures (relating to April 26 Disclosures)
17 (Dkt. 142);
 - 18 • 6/30/22 – Motion to Compel Discovery Responses and Production of
19 Documents (Dkt. 176);
 - 20 • 8/3/22 – Motion to Compel Discovery Necessary for Trade Secret
21 Identification (Dkt. 210);
 - 22 • 8/11/22 – Emergency Clarification of Court's Order at Dkt. 216 (Dkt.
23 226);
 - 24 • 8/11/22 – Motion to Restore Access to Individual Defendants' Devices
25 (Dkt. 228);
 - 26 • 11/7/22 – Motion for Clarification of Order Regarding Third Party
27 Discovery (Dkt. 283);
- 28

- 3/16/22 – Motion to Enforce Compliance with the March 11, 2022 TRO and for Contempt and Adverse Inference Sanctions (Dkt. 400);
- 4/3/22 – Motion to Enforce Compliance with the Court’s Orders (Dkts. 25, 109, 253, 272, 292) and for Monetary Sanctions for Contempt (Dkt. 432).

F. Additional Evidence of Misappropriation Discovered Since Filing the Complaint

1. Substantial Theft of Moog Data by Alin Pilkington

Since the filing of the Complaint, and in connection with the discovery obtained throughout this case, Moog has discovered additional acts of misappropriation by current and former Skyryse personnel. This includes a massive theft of files by former Pilkington such that the volume of stolen data *exceeds 1.4 million files related to at least 20 Moog flight control programs (including several sensitive government programs)*. (Dkt. 180, pp. 6-8; Dkts. 180-001 to 180-004). The Individual Defendants’ theft of Moog data is undisputed, and they have confirmed as much in written discovery responses. (Dkts. 180-009, 180-110.)

2. Theft of Moog Data by Reid Raithel and other Skyryse personnel

As described further in Moog’s Motion to Enforce against Skyryse, Moog has discovered additional acts of theft and misappropriation by other third party Skyryse personnel. This includes: 1) a theft of approximately 27,000 Moog files by Reid Raithel; 2) possession of at least 81 Moog documents on Sathya Achar’s Skyryse laptop; 3) possession of at least 100 Moog spreadsheets on Eric Chung’s Skyryse laptop; and 4) theft of tens of thousands of Moog documents by Tri Dao. (Dkt. 400-3, ¶¶ 8-21, 46-49.)

1 **3. Skyryse’s Possession, Use, and Disclosure of Moog’s Trade**
2 **Secrets and Non-Public Information**

3 As also described further in Moog’s Motion to Enforce against Skyryse,
4 Moog has discovered substantial evidence of Skyryse using, referencing, and
5 disclosing to third parties Moog’s trade secrets and other non-public information.
6 This includes:

- 7 • A substantial volume of correspondence between Skyryse and
8 Hummingbird personnel which contain Moog non-public documents and
9 data;
- 10 • Skyryse’s use of and reference to Moog non-public software checklists
11 and templates;
- 12 • Skyryse’s use of and reference to Moog’s non-public software
13 certification, quality assurance, configuration management, and
14 development plans in developing Skyryse’s own software plans. (Dkt.
15 400-5, ¶¶ 47-87.)

16 **G. The Court Grants Moog Leave to Amend its Complaint**

17 On May 31, 2022, the Individual Defendants filed a Rule 12(b)(6) Motion to
18 Dismiss Counts Six (Conspiracy), Nine (Tortious Interference with Prospective
19 Economic Advantage), and Ten (Unjust Enrichment) of Moog’s Complaint. (Dkt.
20 131.)¹ The hearing on that motion did not occur until April 13, 2023. On April 14,
21 2023, the Court issued its final order, whereby it granted the Individual
22 Defendants’ motion as to Counts Nine and Ten, with leave to amend, and denied
23 the motion as to Count Six (the “MTD Order”). (Dkt. 439.)

24 **H. The Court’s Scheduling Order**

25 The Parties’ Rule 26(f) report was filed on April 17, 2023. (Dkt. 441.) The
26 Court issued its scheduling order on April 19, 2023 (the “Scheduling Order”).

27 _____
28 ¹ Skyryse filed a Rule 12(b)(6) Motion to Dismiss on March 29, 2022 (Dkt. 49),
but subsequently withdrew that motion (Dkt. 79).

(Dkt. 446.) Therein, the Court set the following dates:

- 5/10/23 – deadline for Moog to amend its Complaint (the Parties later stipulated that Moog may have until May 22, 2023 to file a Motion for Leave to file an Amended Pleading (Dkt. 461)), and any “further amendments must be made by motion under Rule 16”;
- 5/9/24 – post-mediation status conference;
- 4/12/24 – deadline to complete fact discovery;
- 5/31/24 – deadline to complete expert discovery;
- 7/8/24 – last day to hear any motions;
- 8/12/24 – pre-trial conference; and
- 8/27/24 – jury trial date.

On April 27, 2023, the Parties filed a joint stipulation, which was entered by the Court, whereby the Parties agreed that instead of Moog filing an amended pleading solely in response to the leave granted by the Court in its MTD Order, Moog could file a more comprehensive Motion for Leave to Amend which responded to the Court’s MTD Order but also included additional amendments sought by Moog. (Dkt. 461.)

I. Moog’s Proposed Amended Complaint

Moog’s Proposed Amended Complaint is attached to the concurrently-filed Naqvi Declaration as Exhibit 1. A redline showing the changes compared to the Original Complaint is attached to the Naqvi Declaration as Exhibit 2. On May 19, 2023, Moog’s counsel circulated to counsel for all Defendants the draft Proposed Amended Complaint and a redline. (Naqvi Dec., ¶ 3).

In terms of substantive allegations, the Proposed Amended Complaint provides the following primary amendments to conform to the facts and evidenced adduced since the filing of the Original Complaint:

- Amending the Moog trade secrets at issue in this litigation to conform to the trade secrets identified in Moog’s Trade Secret Identification, served

on February 21, 2023 (the “TSID”), and now filed with the Court (Dkts. 473-2, 473-3, 474-4);

- Adding or otherwise modifying allegations that directly intersect with or relate to Skyryse’s Counterclaims (Dkt. 348);
- Adding allegations regarding the theft and misappropriation of Moog data by current or former Skyryse personnel Pilkington, Reid Raithel, Eric Chung, Tri Dao, and Sathya Achar, as such facts were not available or known to Moog when the original Complaint was filed; and
- Adding allegations about Skyryse’s possession, use, and disclosure of Moog trade secrets and other non-public information, including in connection with third party Hummingbird Aero, LLC, as such facts were not available or known to Moog when the original Complaint was filed.

In terms of amendments to the causes of action asserted by Moog, the Proposed Amended Complaint provides the following amendments:

- Removing the causes of action for Misappropriation of Trade Secrets (Common Law) (previously Count 2 in the original Complaint), and Tortious Interference with Prospective Economic Advantage (previously Count 9);
- Adding Kim as a defendant to the existing cause of action for Aiding and Abetting Breach of Fiduciary Duty;
- Conforming Moog’s existing cause of action for Unfair Competition such that it is asserted under California’s Unfair Competition Law (Bus. & Prof. Code §§ 17200 *et seq.*); and
- Adding a cause of action for Conversion against all Defendants and adding a cause of action for Breach of the Implied Covenant of Good Faith and Fair Dealing against Skyryse only based on the 2018 and 2019 NDAs executed between the Parties.

Moog is not seeking to add any substantial factual allegations that are new or unknown to Defendants. All of the factual allegations that are proposed to be added have already been heavily litigated in this case, disclosed to Defendants, or based on discovery produced by Defendants, including in connection with Moog's TSID and its Motion to Enforce.

III. LEGAL STANDARDS

Federal Rule of Civil Procedure 15(a) sets forth the standard for granting leave to amend. It provides that: "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Supreme Court has made clear that there is a strong federal policy favoring determination of cases on the merits and, as a result, leave to amend should be granted unless the party opposing the amendment can demonstrate substantial prejudice or a bad faith or dilatory motive by the moving party. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). The Ninth Circuit has repeatedly followed the Supreme Court's lead. Where there is a "lack of prejudice to the opposing party and the amended complaint is obviously not frivolous or made as a dilatory maneuver in bad faith, it is an ***abuse of discretion*** to deny such a motion." *Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Industry of So. Calif.*, 648 F.2d 1252, 1254-1255 (9th Cir. 1981) (emphasis added). *See also Sonoma County Ass'n of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1117 (9th Cir. 2013) (noting that the policy to grant leave is applied with "extreme liberality"); *Eminence Capital, LLC, v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (leave is granted with "extreme liberality," and prejudice to the opposing party is the touchstone of the inquiry); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186-87 (9th Cir. 1987) (noting that Rule 15's policy "should be applied with extreme liberality" and that granting leave "is not dependent on whether the amendment will add causes of action or parties," but rather on whether the amendment "cause[s] the opposing party undue prejudice").

1 In determining whether to grant leave to amend, courts consider five factors
2 (known as the “*Foman* factors”): (1) prejudice to the opposing party; (2) the
3 presence of bad faith; (3) undue delay; (4) whether the plaintiff has previously
4 amended the complaint; and (5) the futility of amendment. See *U.S. v. Corinthian*
5 *Colleges*, 655 F.3d 984, 995-95 (9th Cir. 2011) (citing *Foman*, 371 U.S. at 182).
6 While the determination of whether to grant leave to amend is committed to the
7 sound discretion of the district court, courts may decline to grant leave to amend
8 “only if there is strong evidence” of one or more of the *Foman* factors. *Sonoma*
9 *County Ass’n of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1117 (9th
10 Cir. 2013); see *M.H. v. County of Alameda*, 2012 WL 5835732, *3 (N.D. Cal.
11 Nov. 16, 2012) (granting leave to amend to add new allegations and observing that
12 “[c]ourts routinely allow parties to amend their pleadings”). “Not all of the factors
13 merit equal weight. As this circuit and others have held, it is the consideration of
14 prejudice to the opposing party that carries the greatest weight.” *Eminence Capital,*
15 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

16 **IV. ARGUMENT**

17 **A. There is no Prejudice to Defendants**

18 There must be “strong evidence” of prejudice before a district court can
19 deny leave to amend. *Sonoma County Ass’n of Retired Employees*, 708 F.3d at
20 1117. Absent such a showing, “there exists a presumption . . . in favor of granting
21 leave to amend.” *Eminence Capital, LLC*, 316 F.3d at 1052. “Bald assertions of
22 prejudice” are insufficient. *Hurn*, 648 F.2d at 1254 quoting *Conley v. Gibson*, 335
23 U.S. 41, 48 (1957). Instead, the opposing party must establish that the amendment
24 “unfairly disadvantage[s] or deprive[s] [it] of the opportunity to present facts or
25 evidence which it would have offered had the amendments been timely.” *Heyl &*
26 *Patterson Int’l. Inc. v. F.D. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419,
27 426 (3rd Cir. 1981). And, “[a]ny prejudice to the nonmovant must be weighed
28 against the prejudice to the moving party by not allowing the amendment.” *Bell v.*

1 *Allstate Life Ins. Co.*, 160 F3d 452, 454 (8th Cir. 1998). “[T]o justify denial of
2 leave to amend, the prejudice must be substantial.” *Luma Pictures, Inc. v. Betuel*,
3 No. CV 16-2625-GW(PLAX), 2016 WL 11519331, at *3 (C.D. Cal. Sept. 29,
4 2016). “There should be some showing of an inability to respond to the proposed
5 amendment.” *Id.* (“The need for additional discovery, expenses, or delay is
6 insufficient by itself to serve as the substantial prejudice necessary to deny a
7 proposed amended pleading.”).

8 There is no prejudice to Defendants for multiple reasons. First, Moog does
9 not seek to add any factual allegations which are unknown to Defendants or which
10 would change the direction of discovery in this case. All of Moog’s proposed
11 amendments merely seek to conform its pleading to the evidence and discovery
12 adduced in this case. All of the proposed amendments relate to the same nucleus of
13 facts—the theft and misappropriation of Moog’s data by Skyryse personnel, and
14 the unlawful hiring of Moog employees by Skyryse. All these amendments relate
15 to the same causes of action in the original Complaint of which Skyryse did not
16 pursue any motion to dismiss (Dkts. 49, 79). Moog is not injecting any entirely
17 new fact patterns. The facts that Moog seeks to add have been litigated throughout
18 this case, or were otherwise obtained through discovery in this case. Certain of the
19 amendments also directly intersect with and relate to the claims and allegations in
20 Skyryse’s Counterclaims (Dkt. 348), so Skyryse is clearly on notice of those facts
21 and events.

22 Where, as here, an amendment to include an additional claim merely adds or
23 clarifies the party’s legal theories of recovery, there can be no prejudice. Such an
24 amendment does not change the factual direction of the case, thereby creating a
25 need for additional discovery, and therefore does not disrupt the course or schedule
26 of the litigation. *Foman*, 371 U.S. at 182 (overturning denial of leave to amend
27 because “the amendment would have done no more than state an alternative theory
28 for recovery”); *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975

1 (9th Cir. 2011) cert. denied, 132 S. Ct. 1566, 182 L. Ed. 2d 168 (U.S. 2012)
2 (affirming the granting of leave to amend because the amendment “created no
3 meaningful case management issues and did not infringe on the efficient
4 adjudication of the litigation because” the amendment presented only a new theory
5 “based on the factual record already developed”); *Hurn*, 648 F.2d at 1254-1255
6 (overturning denial of leave to amend to add a claim where the new claim was
7 based on the same factual record and the opposing party pointed to no additional
8 discovery that it needed in order to litigate the claims); *Knudsen v. City and County*
9 *of San Francisco*, 2013 WL 6235507, at *2 (N.D. Cal. 2013) (granting leave to
10 amend to add defenses even though the defendants were aware of the availability
11 of the defenses months prior because the additional defenses required no new
12 evidence gathering on the part of the plaintiff); *Harrison v. Rubin*, 174 F.3d 249,
13 253 (D.C. Cir. 1999) (overturning denial of leave to amend to add a cause of action
14 where the new cause of action was based on the same facts, but presented just a
15 slightly different legal theory); *Teamsters Pension Trust Fund of Philadelphia and*
16 *Vicinity v. CBS Records, a Div. of CBS, Inc.*, 103 F.R.D. 83, 85 (E.D. Pa. 1984)
17 (permitting amendment to add unpled statute of limitations defense because “[t]he
18 facts underlying [defendant’s] proposed [statute of limitations] affirmative defense
19 are subsumed within the facts relevant to [defendant’s] affirmative defense that
20 plaintiffs’ claim is barred by the doctrines of laches, estoppel, and waiver”).

21 Second, the deadline to complete fact discovery is almost one year away,
22 April 12, 2024. Even to the extent Moog’s proposed amendments require new or
23 additional discovery, Defendants have more than ample time to conduct any
24 necessary discovery. Indeed, prejudice has been found where “[t]he parties have
25 engaged in voluminous and protracted discovery” and where “[e]xpense, delay,
26 and wear and tear on individuals and companies” is shown. *See Texaco, Inc. v.*
27 *Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991). In contrast, here, the parties are still
28 in the early stages of the case. No fact-depositions have been taken to date. The

1 Rule 26 Scheduling Conference took place approximately just one month ago. The
2 Parties have only recently propounded their initial sets of written discovery beyond
3 the initial round of expedited discovery served early in the case. While almost all
4 the discovery related to Moog's amendments has already occurred or is subsumed
5 in Skyryse's pre-existing discovery requests, Skyryse has ample time to conduct
6 any additional discovery it needs. There is no prejudice.

7 **B. There is No Bad Faith**

8 "A court may deny leave to amend if it determines the amendment is sought
9 solely for delay, or to defeat the court's jurisdiction." *Luma Pictures, Inc.*, 2016
10 WL 11519331, at *3.

11 There is no bad faith whatsoever. Moog merely seeks to conform its
12 pleading to the voluminous and critical evidence adduced since the Complaint was
13 filed. Moog is not adding any parties to defeat the Court's jurisdiction. Moog is not
14 adding entirely new fact patterns unknown to Defendants. No delay will be caused
15 by the proposed amendments, given that the fact discovery cut-off is almost one
16 year away.

17 **C. There is No Undue Delay**

18 There is no undue delay in Moog seeking amendment now. First, Moog was
19 prevented from discovering critical evidence related to Defendants' theft and
20 misappropriation of Moog data. As described above, Moog had to file several
21 motions to obtain compliance with discovery obligations and compliance with the
22 TRO. Throughout this case, Moog has obtained at various points additional and
23 new evidence regarding Defendants' wrongful conduct. To promote judicial
24 economy and to avoid serial amendments, Moog wanted to wait until it had
25 received additional evidence it was entitled to before seeking an omnibus
26 amendment, rather than seeking amendment each time it learned to additional theft
27 and misappropriation by Defendants. Much of the evidence incorporated into
28

1 Moog's Proposed Amended Complaint was not received by Moog until the last
2 few months. Moog has promptly sought amendment.

3 Second, Moog seeks amendment in conjunction with the Court's ruling the
4 Individual Defendants' Motion to Dismiss (Dkt. 439.) The Court granted Moog
5 leave to amend two of its causes of action. Again, to promote judicial economy,
6 Moog wanted to wait until the Court ruled on the Individual Defendants' Motion to
7 Dismiss before seeking any amendment so that there would just be one amended
8 pleading. Moog would have had to seek leave if it wished to amend its pleading
9 before the Court ruled on the Individual Defendants' Motion to Dismiss. Because
10 Moog has to amend its Complaint anyway in response to the Court's MTD Order,
11 it makes sense for Moog to amend the rest of its pleading once, at the same time.
12 Indeed, the Parties stipulated that in lieu of solely amending its Complaint in
13 response to the Court's MTD order, Moog could file a Motion for Leave to Amend
14 to substantially amend its Complaint. (Dkt. 461.)

15 Finally, as set forth above, Moog is seeking amendment almost one year
16 before the fact discovery cut-off, and more than 15 months before the trial date.
17 Moog is not seeking a last-minute amendment. Moog has been diligent in pursuing
18 its claims, and has sought amendment after obtaining key, additional evidence
19 (including from third parties) within the past few months.

20 Even if the Court did find that Moog unduly delayed bringing this Motion, a
21 finding of delay would not by itself be grounds for denying Plaintiffs' leave to
22 amend. *See Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999) (undue delay
23 factor "by itself . . . is insufficient to justify denying a motion to amend").

24 Further, far longer delays than any which apply here have been found not to
25 constitute an "undue delay" justifying denial of leave to amend. *See Morongo*
26 *Band of Mission Indians v. Rose*, 893 F.2d at 1079 (delay of nearly two years after
27 filing original complaint before seeking leave to file amended complaint was "not
28 alone enough to support denial" of motion for leave to amend); *Scott v. Family*

1 *Dollar Stores, Inc.*, 733 F.3d 105, 119 (4th Cir. 2013) (defendant not unduly
2 prejudiced by amendment even though plaintiff had waited three years to seek
3 leave to amend, where discovery was still open and case was “many steps
4 removed from trial”); *Dixon v. Magna-RX, Inc.*, 2016 WL1397584 (C.D. Cal.,
5 Mar. 31, 2016) (granting motion for leave to file second amended complaint more
6 than a year and a half after filing of initial complaint and five months before trial
7 upon finding that defendant was not unduly prejudiced, because while the amended
8 complaint added new parties, it did not add any new causes of action against
9 existing defendants and did not “alter the nature of the litigation”); *Miramontes v.*
10 *Mills*, 2015 WL13609449 (C.D. Cal. May, 18, 2015) (granting leave to amend to
11 add two new causes of action and finding defendant not unduly prejudiced because
12 fact discovery cut-off date was still nearly three months away and claims plaintiff
13 sought to add were “based on the factual allegations that underlie the fraud claims
14 asserted in the original complaint”).

15 **D. The Proposed Amendments are Not Futile**

16 “An amendment is futile when ‘no set of facts can be proved under the
17 amendment to the pleadings that would constitute a valid and sufficient claim or
18 defense.’” *Missouri ex rel. Koster v. Harris*, 2017 WL 361934, at *6 (9th Cir. Jan.
19 17, 2017) (quoting *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir.
20 1988)). Absent clear futilities, challenges to the legal sufficiency of a proposed
21 amendment should be “raised in a motion to dismiss rather than in an opposition to
22 a motion for leave to amend.” *SAES Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp.
23 2d 1081, 1086 (S.D. Cal. 2002). Thus, Courts generally defer consideration of
24 challenges to the merits of a proposed amended pleading until after it is filed. *See*
25 *Netbula, LLC v. Distinct Corp.*, 212 F.R.D. 534, 538– 39 (N.D. Cal. 2003)
26 (“[d]enial of leave to amend on this ground is rare.”). Futility “includes the
27 inevitability of a claim’s defeat on summary judgment.” *California ex rel.*

1 *California Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661,
2 673 (9th Cir. 2004).

3 Moog's proposed amendments are not futile. Moog is seeking to add two
4 causes of action which are related to the facts underlying Moog's other, pre-
5 existing causes of action (including for trade secret misappropriation and breach of
6 contract), all of which advanced beyond the pleading stage without challenge from
7 Defendants. Moog is not adding entirely new fact patterns or legal theories. It is
8 merely supplementing its pre-existing claims and theories. Kim and Pilkington's
9 theft of Moog data is undisputed. There is substantial evidence before the Court
10 that Skyryse has possessed, used, and disclosed Moog's trade secrets and other
11 non-public information. Moog's proposed amendments merely seek to conform its
12 pleadings to the facts and evidenced adduced in the case. There can be no colorable
13 argument that there are "no set of facts can be proved under the amendment to the
14 pleadings that would constitute a valid and sufficient claim or defense."

15 **E. This is Moog's First Proposed Amendment**

16 This is Moog's first proposed amendment, which it has timed in conjunction
17 to respond to the Court's MTD Order. Moog does not intend to seek any further
18 amendment at this time, while reserving the right to do so upon a showing of good
19 cause. This favors granting the Motion.

20 **V. CONCLUSION**

21 For the foregoing reasons, Moog respectfully requests the Court grant the
22 Motion and enter the Proposed Amended Complaint attached as Exhibit 1 to the
23 concurrently filed Naqvi Declaration.

24 Dated: May 22, 2023

SHEPPARD MULLIN RICHTER & HAMPTON LLP

25 By /s/ Rena Andoh
26 Rena Andoh

27 Attorney for Plaintiff and Counterdefendant
28 MOOG INC.

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Moog Inc., certifies that this brief contains 5,336 words, which:

 X complies with the word limit of L.R. 11-6.1.

 complies with the word limit set by Court order dated .

Dated: May 22, 2023

SHEPPARD MULLIN RICHTER & HAMPTON LLP

By

/s/ Rena Andoh

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